United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT-WITHOUT ORAL ARGUMENT

Date: December 18, 1996

BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge

Honorable RICHARD D. CUDAHY, Circuit Judge

Honorable KENNETH F. RIPPLE, Circuit Judge

No. 95-2720

STEVEN D. DONOVAN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeals from the United States District Court for the Eastern District of Wisconsin
Nos. 91 CR 265 & 95 C 473, J.P. Stadtmueller, Chief Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Submitted October 11, 1996*
Decided December 18, 1996
Before

Hon. WILLIAM J. BAUER,
Circuit Judge

Hon. RICHARD D. CUDAHY,
Circuit Judge

Hon. KENNETH F. RIPPLE,
Circuit Judge

STEVEN D. DONOVAN,
Petitioner-Appellant,
No. 95-2720 v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 95 C 473
J.P. Stadtmueller,
Chief Judge.

*This successive appeal has been assigned to the original panel under Internal Operating Procedure 6(b). The panel heard oral argument on the initial appeal and is unanimously of the view that a second argument is unnecessary.

ORDER

Steven Donovan, along with three others, was convicted of cocaine trafficking and sentenced to life imprisonment. His conviction was affirmed by this court on appeal. United States v. Donovan, 24 F.3d 908 (7th Cir. 1994). Donovan then filed a pro se petition under 28 U.S.C. Sec. 2255 to vacate, set aside, or correct his sentence. The district court found that Donovan procedurally defaulted all of his claims by failing to raise them on direct appeal, and summarily dismissed the petition. On appeal, Donovan argues that the district court erred in summarily dismissing his petition because (1) there was an insufficient record developed at trial to allow him to challenge on direct appeal the government's intrusion upon his confidential communications with counsel; (2) forfeiture of his property caused his criminal sentence to be imposed in violation of the Double Jeopardy Clause under the Fifth Amendment; and (3) his trial and appellate counsel both rendered ineffective assistance.

We assume familiarity with the facts from our prior opinion and do not restate them here.

In reviewing the district court's denial of Donovan's Sec. 2255 motion, we review all factual determinations for clear error and consider all questions of law *de novo*. *Bond v. United States*, 77 F.3d 1009, 1012 (7th Cir.), *cert. denied*, 117 S.Ct. 270 (1996). Relief may be available if Donovan can demonstrate flaws in his conviction or sentence "which are jurisdictional in nature, constitutional in magnitude, or result in a complete miscarriage of justice." *Boyer v. United States*, 55 F.3d 296, 298 (7th Cir.), *cert. denied*, 116 S.Ct. 268 (1995). However, a Sec. 2255 motion is not a substitute for a direct appeal. *Doe v. United States*, 51 F.3d 693, 698 (7th Cir.), *cert. denied*, 116 S.Ct. 205 (1995). An argument that was not raised on direct appeal cannot first be presented on collateral review "absent of showing of cause' for the failure to advance the argument sooner 'and some showing of actual prejudice resulting from the

alleged constitutional violation.'" *Kelly v. United States*, 29 F.3d 1107, 1112 (7th Cir. 1994) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)).

Donovan first argues that the record was insufficiently developed at trial to mount a challenge on direct appeal to the government's infiltration of his privileged communications with counsel. This argument requires some background information. Shortly after Donovan had been released on bond, he and his codefendants met with their lawyers in Chicago. At Donovan's insistence, his girlfriend Wanda Young also attended that meeting. Donovan wanted Young to sign an affidavit prepared by counsel asserting that she could not remember any of the alleged events in the conspiracy due to her long-time cocaine usage. Young, who at the time was working with the government as an informant, had been equipped with a wire transmitter in case Donovan attempted to prevent her from testifying against him at his upcoming trial.

Subsequently, yet still before trial, Donovan filed a motion to suppress, alleging that the government had paid Young to solicit information from him during his privileged communications with counsel. (R.40, at 3.) A magistrate judge recommended that the motion be denied (R.53, at 13-14), and Donovan filed objections. (R.65,67.) The district court rejected the objections and denied the motion. (Tr. of 2/19/92, at 188-90.) The government did not introduce at trial any information relating to Young's attendance at the Chicago meeting.

For his direct appeal, Donovan obtained new counsel, but appellate counsel did not pursue the issue of the government's alleged intrusion into Donovan's attorney-client communications. Donovan renewed the claim in his Sec. 2255 petition, but the district court found the claim procedurally defaulted because Donovan failed to raise it on direct appeal. Donovan now contends that the record developed at trial was

insufficient to permit raising the claim on direct appeal.

Contrary to Donovan's contention, the record concerning Young's attendance in Chicago was fully developed before trial and could have been raised on appeal. This claim was the subject of Donovan's pretrial motion to suppress evidence and was addressed by the magistrate judge who recommended that Donovan's motion be denied. Donovan could have challenged the denial of his motion to suppress on direct appeal, but he did not. Having bypassed the opportunity to raise the claim on direct appeal, Donovan may not demand belated review without demonstrating cause for the default and actual prejudice. *Scott v. United States*, 997 F.2d 340, 343 (7th Cir. 1993). Donovan has shown neither.

Donovan next argues that the forfeiture of several items of his personal property under 21 U.S.C. Sec. 881 along with his criminal sentence constituted double jeopardy. This claim is foreclosed by the Supreme Court's recent decision in *United States v. Ursery*, 116

S.Ct. 2135, 2146-47 (1996). In *Ursery*, the Court held that *in rem* civil forfeitures under Sec. 881 were not "punishment" for purposes of the Double Jeopardy Clause. *Id.* at 2149. The forfeiture of Donovan's property did not place him in jeopardy a second time. *Id; United States v. $87,118.00 in U.S. Currency*, 95 F.3d 511, 514-15 (7th Cir. 1996).

Donovan also contends that his Sixth Amendment right to counsel was violated because his trial lawyer was ineffective. Specifically, Donovan asserts that trial counsel rendered ineffective assistance by preventing him from testifying at trial. In addition, Donovan argues that counsel was ineffective in failing to object to (1) the government's use of Al Cadena's and Rick Kizel's guilty pleas as evidence of Donovan's guilt; (2) the government's use of evidence of Donovan's prior state record; (3) the district court's decision to not exclude evidence regarding Donovan's material possessions and financial status; and (4) the court's decision to not exclude several audio and video

recordings of attempted drug transactions.

Donovan failed to raise all of these claims on direct appeal. Claims of ineffective assistance which are based upon the trial record alone must be brought on direct appeal or they are procedurally defaulted. *Guinan v. United States*, 6 F.3d 468, 472 (7th Cir. 1993); *Bond v. United States*, 1 F.3d 631, 635 (7th Cir. 1993); *United States v. Taglia*, 922 F.2d 413, 418(7th Cir. 1991). Although Donovan argues that his failure to raise these claims on direct appeal was caused by the ineffective assistance of appellate counsel, Donovan bears a heavy burden in overcoming the presumption that counsel rendered reasonably effective assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To establish ineffective assistance, Donovan must show "that counsel's representation fell below an objective standard of reasonableness" and, additionally, "that there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

We have repeatedly emphasized that appellate counsel need not advance every conceivable argument on appeal. Appellate counsel is constitutionally ineffective only if "counsel fails to raise issues that are (1) obvious, and (2) clearly stronger than the ones raised." *Kelly v. United States*, 29 F.3d 1107, 1112 (7th Cir. 1994). The issues Donovan cites here are neither obvious nor clearly stronger than those presented and decided on direct appeal. *Donovan*, 24 F.3d 908 (7th Cir. 1994). The district court concluded, and we agree, that counsel could reasonably have determined that there was insufficient merit to pursue these issues, or that raising these issues would have detracted from the arguments made on appeal. *See Velarde v. United States*, 972 F.3d 826, 829 (7th Cir. 1992).

Finally, Donovan argues that the district court erred by not conducting an evidentiary hearing on his claims of ineffective assistance of trial counsel. However, Donovan never asked the district court to hold such a hearing. Because Donovan failed to request an evidentiary hearing, the district court could not be expected to be a "mind reader[]" and convene one. *United States v. Mala*, 7 F.3d 1058, 1062 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1839 (1994). In any event, none of the allegations in Donovan's petition warranted a Sec. 2255 hearing. *See Key v. United States*, 806 F.3d 133, 140 (7th Cir. 1986).

AFFIRMED.

June 12, 1995

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN
STEVEN D. DONOVAN,

Petitioner,

JUDGMENT IN A CIVIL CASE

V.

UNITED STATES OF AMERICAN,

Respondent.
CASE NUMBER: 95-C-473
(91-Cr-265)

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Donovan's motion to vacate, set aside, or correct his sentence be and the same is hereby summarily DISMISSED pursuant to Rule 4 of the Federal Rules Governing Sec. 2255 Proceedings; and

IT IS FURTHER ORDERED that Donovan's request for leave to proceed *in forma pauperis* be and the same is hereby DENIED as moot.

6/12/95 SOFRON B. NEDILSKY
Date Clerk

Copy mailed to attorneys for parties by the Court pursuant to Fed.R.Civ.P.77(d).

"s/Michael Kramer"
(By) Deputy Clerk

June 9, 1995

UNITED STATES DISTRICT COURT
EASTER DISTRICT OF WISCONSIN

STEVEN D. DONOVAN,

Petitioner,

Case No. 95-C-473
(91-CR-265)

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

On January 7, 1992, a grand jury returned a six-count superseding indictment charging four persons, including Steven D. Donovan, with offenses related to cocaine trafficking. All four defendants proceeded to trial. On February 27, 1992, the jury returned guilty verdicts against each of the defendants on all counts. The defendants appealed their convictions, and the Seventh Circuit affirmed.

UNITED STATES v. DONOVAN, 24 F.3d 908 (7th Cir.), cert. denied, __ U.S. __, 115 S.Ct. 269 (1994). On May 1, 1995, Donovan filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. Sec. 2255. Donovan's motion presently is before the court for preliminary consideration pursuant to Rule 4 of the Federal Rules Governing Sec. 2255 Proceedings.

I. BACKGROUND

The four defendants, Donovan, Vincent Donovan, Patrick A. Shea, and Stephen J. Dineen, were charged with being members of a conspiracy to possess with intent to distribute cocaine from 1986 to 1991. According to the testimony at trial, Donovan's brother, Vincent, who lived in Milwaukee, met Al Cadena in Miami in 1985 and bought three ounces of cocaine from him. At that time, they discussed the possibility of future deals. About a week later, Vincent telephoned Cadena and told him that he would travel to Miami to buy more cocaine.

Vincent bought seven ounces of cocaine from Cadena and told him that he knew others that would be interested in Cadena's cocaine because of its quality and price.

In February or March 1986, Vincent met with Cadean again, this time purchasing 250 grams of cocaine, approximately half on a "front" basis. About a month later, both Donovan and Vincent travelled to Miami. They bought a half kilogram of cocaine from Cadena and told him they would split the cocaine between the two of them to sell to customers. In April 1986, the Donovan brothers again met with Cadena in Miami. They paid Cadena what they owed him from the last purchase and bought another kilogram of cocaine.

In June 1986, Cadena travelled to Milwaukee to meet the Donovans. The brothers paid Cadena for the previous deal, and Cadena met Donovan's girlfriend, Wanda Young. They also discussed future transactions.

Donovan and Young transported cocaine from Miami to Milwaukee. During their first buying trip in October 1986, Donovan and Young bought between nine ounces and two kilograms of cocaine from Cadena, which Young taped to her body in order to transport the cocaine on the plane. Donovan and Young made additional trips to Miami in December 1986 and January 1987. On each trip, they purchased between a half and a full kilogram of cocaine from Cadena with money belonging to the Donovans.

Rich Kizel, the employer of defendant Stephen Dineen, bought cocaine from Patrick Shea beginning in December 1987. In February 1988, Kizel bought five to six ounces of cocaine from Shea, and the two of them purchased a kilogram from a Chicago-based supplier. In March 1988, Kizel contacted Vincent and asked if he should bring any cocaine back to Milwaukee from Miami. Vincent put Kizel in contact with Cadena, who sold Kizel between a half and a full kilogram of cocaine. Cadena also fronted

Kizel another kilogram to deliver to Vincent.

In April 1988, Vincent informed Cadena that he would change his business to a Chicago-based supplier because it was too risky to transport cocaine to Milwaukee from Miami. Cadena travelled to Milwaukee to meet with the Donovans. After talking to them, Cadena understood that the Donovans would purchase cocaine from Cadena when Kizel could transport the cocaine from Miami to Milwaukee. In November and December 1988, Kizel went to Miami twice and bought a kilogram of cocaine from Cadena each time. Kizel and Shea also bought cocaine from the Chicago dealer during this time.

In December 1988, Kizel, Shea, and Vincent met to discuss purchasing larger amounts of cocaine from Cadena. To facilitate the larger shipments, Kizel proposed that they rent a storage shed in Kizel's girlfriend's name and keep a car in the shed. The cocaine would be hidden in the car's engine compartment. Shea

and Vincent agreed, and Shea provided an abandoned car for the project. On December 26, Kizel's girlfriend rented two storage sheds in West Allis. Kizel, Shea, and Vincent placed the car on a trailer provided by Vincent and put the car and trailer in the larger of the two sheds. Kizel gave the keys to Shea and Vincent. The abandoned car was never used as planned by Shea and Vincent because they bought cheaper cocaine from Chicago in early 1989.

In January 1989, Kizel moved to Florida and purchased two kilograms of cocaine from Cadena. Kizel arranged for the transport of the cocaine to Milwaukee. One fourth of the cocaine was fronted to Shea (whom Kizel instructed to pay Vincent for the cocaine). Cadena believed that one kilogram was for Vincent.

In mid-February 1989, Kizel obtained three kilograms of cocaine from Cadena. Vincent arranged the purchase and told Cadena that one kilogram was for his customers.

The other two kilograms were for Shea. Cadena and Vincent also made arrangements for Kizel to pick up another three kilograms for Vincent. About a week later, Kizel purchased another five kilograms of cocaine from Cadena, two for himself and three for Vincent. Kizel gave the cocaine to a courier, who transported it to Milwaukee and put it in one of the storage sheds.

On February 22, 1989, Kizel learned that law enforcement was searching his two sheds. During the search, DEA officials seized the car and trailer. No cocaine was seized, as the courier had placed the cocaine in a different shed facility. Fearing that the other shed would be searched as well, Kizel divided his two kilograms of cocaine into five separate eight-ounce packages and placed the packages in another storage shed belonging to one of his customers, John Unger. Kizel instructed Unger to remove the packages immediately.

Kizel took the remaining three kilograms of cocaine to yet another storage shed. He took about 12 ounces of the cocaine to Shea to get rid of it. Kizel and Vincent then picked up Vincent's three kilograms from the storage shed. Kizel departed for Florida by car. After telephoning Unger while en route, Kizel learned that Unger had been arrested and that the cocaine from Unger's shed had been seized.

In March 1989, Vincent and his girlfriend drove to Miami to meet with Kizel. Kizel told Vincent that the sheds had been raided and Vincent's trailer seized. Vincent and Kizel purchased two kilograms of cocaine from Cadena and discussed transporting future shipments of cocaine to Chicago. A week later Vincent advised Kizel that he was being investigated and should not return to Milwaukee.

On April 20, 1989, Cadena checked into the Allerton Hotel in Chicago and informed Vincent that he was ready to conduct a multiple-kilogram deal.

Vincent, along with his father and brother-in-law, went to the hotel and told Cadena that they did not yet have the money for the deal. Vincent proposed that he talk to his other supplier, who could buy ten kilograms of cocaine at a time from Cadena if Cadena could wait a few days. Cadena developed back problems, however, and had to leave Chicago before the deal was consummated.

Through June 1990, the Donovan brothers continued to deal with Cadena in Miami. Kizel was arrested in June 1990 and agreed to cooperate with law enforcement authorities. Kizel reported several conversations with Donovan to law enforcement authorities, including the facts that Donovan was getting cocaine from Shea but was looking for better prices, that he was selling between two and ten ounces of cocaine a week, and that he had transported cocaine purchased from Cadena by taping it to his girlfriend's stomach. On June 6, 1991, Donovan was videotaped in a Milwaukee motel with Kizel and an undercover

DEA agent while negotiating the purchase of one or more kilograms of cocaine. Donovan did not go through with the purchase and told Kizel that he suspected him of setting him up.

Eventually, law enforcement authorities obtained enough evidence against the four defendants to commence prosecution. At trial, several witnesses, including Kizel, Cadena, and Young, testified that the Donovan brothers sold cocaine in the Milwaukee area during the time of the conspiracy. The jury returned a guilty verdict against all four defendants. On October 29, 1992, a judgment of conviction was entered against Donovan. The court sentenced Donovan to life imprisonment, as mandated by statute.

Donovan appealed his conviction, arguing (1) that Young should not have been allowed to testify because she relied on documentary evidence improperly taken from Donovan and given to the IRS, (2) that the government made several

improper remarks during its closing and rebuttal, and (3) that the district court erred in failing to give a jury instruction regarding a multiple conspiracy theory. The Seventh Circuit found each of these arguments without merit and affirmed Donovan's conviction, along with those of his codefendants. Donovan now seeks collateral relief under Sec. 2255.

II. DISCUSSION

Sec. 2255 allows federal prisoners to collaterally challenge their sentences on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. Sec. 2255. Like habeas corpus, Sec. 2255 "is confined to correcting errors that vitiate the sentencing court's

jurisdiction or are otherwise of constitutional magnitude." Guinan v. United States, 6 F.3d 468, 470 (7th Cir. 1993).

Sec. 2255 "will not be allowed to do service for an appeal." Theodorou v. United States, 887 F.2d 1336, 1339 (7th Cir. 1989). "[T]o obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Thus, district courts generally may not reach the merits of an appealable issue in a Sec. 2255 proceeding unless that issue has been previously raised on direct appeal. Theodorou, 887 F.2d at 1340. However, a petitioner may obtain collateral relief based on trial errors not challenged on direct appeal upon a showing of "(1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." Frady, 456 U.S. at 168. A petitioner's burden of showing actual prejudice entails establishing "not merely that the errors at his trial created

a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 456 U.S. at 170.

Here, Donovan argues that his sentence should be vacated for eight reasons: (1) the government improperly used Cadena's and Kizel's guilty pleas as evidence of Donovan's guilt; (2) the government improperly used evidence of Donovan's prior state and criminal record; (3) the district court should have excluded evidence regarding Donovan's material possessions and financial status; (4) the district court should have excluded several audio and video recordings of attempted drug transactions because the government failed to get prior judicial authorization to record the conversation; (5) the civil forfeiture of Donovan's property and his criminal sentence constitute double jeopardy; (6) Donovan's trial counsel prevented him from testifying at trial; (7) the government sent a wired

informant, posing as a potential codefendant, to a meeting between the defendants and their counsel; and (8) Donovan's trial and appellate counsel rendered ineffective assistance by failing to object to the above alleged errors at trial and by failing to raise the above alleged errors on appeal.

Each of the grounds raised in Donovan's petition was not raised either at trial or on appeal. Thus, unless Donovan can show cause and actual prejudice, I will be obliged to conclude that he has defaulted his claims. Donovan appears savvy of this limitation, as he goes on to argue that the failure to raise those grounds either at trial or on appeal resulted from ineffective assistance of counsel.

In the context of alleged ineffective assistance of counsel, the "cause and actual prejudice" standard applicable to collateral attacks means that an ineffective-assistance claim based on the record must be raised on direct appeal or it is waived. However, if an

ineffective-assistance claim is based on new evidence, or if the defendant had the same counsel for trial and appeal, then a petitioner may raise it at the collateral stage. Guinan, 6 F.3d at 472.

Here, Donovan had different counsel at trial and on appeal. He did not raise the errors alleged in his petition, including ineffective assistance of counsel at trial, on appeal. Attempting to avoid procedural default, Donovan argues that the failure was due to ineffective assistance of cou[illegible] on appeal.

"So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." Murray v. Carrier, 477 U.S. 478, 488 (1986). Further, "[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural

default even when that default occurs on appeal rather than at trial. To the contrary, cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." Murray, 477 U.S. at 492. Thus, if the performance of Donovan's appellate counsel meets the Strickland test for constitutional adequacy, "cause" for his procedural default will not be found based on ineffective assistance of counsel, and all allegations raised in his petition that were not brought on direct appeal are barred from consideration.

To prevail on an ineffective-assistance claim, a petitioner must show that his trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's professional errors, the result of the trial would have been different. Strickland, 466 U.S. at 687-88, 694. If the court determines that the petitioner has failed to satisfy either requirement,

it need not address the other. Chichakly v. United States, 926 F.2d 624, 630-31 (7th Cir. 1991). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

The Seventh Circuit has described the standard by which a district court should examine a petitioner's claim that his appellate counsel rendered ineffective assistance by failing to raise certain issues on appeal:

> Had appellate counsel failed to raise a significant and obvious issue, the failure could be viewed as deficient performance. If an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial ... When a claim of ineffective assistance is based on failure to raise viable

> issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1985); see also Kelly v. United States, 29 F.3d 1107, 1112 (7th Cir. 1994).

The failure of Donovan's appellate counsel to raise all the issues which Donovan argues were viable was not objectively unreasonable. It fell within the ambit of trial tactics or strategy, which are protected by a strong presumption of reasonableness. Strickland, 466 U.S. at 689. Donovan's appellate counsel raised

several issues on appeal, which the Seventh Circuit addressed in a relatively lengthy, and published, opinion. His attorney could well have concluded that there was insufficient merit to pursue these issues, or that they would have detracted from the arguments made on appeal. See Velarde v. United States, 972 F.2d 826, 829 (7th Cir. 1992). I find none of the grounds raised in Donovan's petition to be "clearly stronger" than those raised on appeal. I do not find Donovan's appellate counsel's performance deficient under Strickland and Greer, and thus I need not address Strickland's prejudice prong. Having failed to show that his appellate counsel rendered ineffective assistance, Donovan likewise has failed to show cause for his procedural default of the issues raised in his petition.

III. CONCLUSION

Donovan has failed to show cause for failing to raise on direct appeal the grounds raised in his petition. I conclude that it plainly appears from the face of Donovan's motion and exhibits

that he is not entitled to relief and thus I am obliged to summarily dismiss his petition.

Accordingly,

IT IS ORDERED that Donovan's motion to vacate, set aside, or correct his sentence be and the same is hereby summarily **DISMISSED** pursuant to Rule 4 of the Federal Rules Governing Sec. 2255 Proceedings; and

IT IS FURTHER ORDERED that Donovan's request for leave to proceed *in forma pauperis* be and the same is hereby **DENIED** as moot.

The clerk is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 9th day of June, 1995.

BY THE COURT:

"s/J.P. Stadtmueller"
U.S. District Judge